

**WEST VIRGINIA PUBLIC EMPLOYEES  
GRIEVANCE BOARD**

**SYNOPSIS REPORT**

**Decisions Issued in September 2014**

The Board's monthly reports are intended to assist public employers covered by a grievance procedure to monitor significant personnel-related matters which came before the Grievance Board, and to ascertain whether any personnel policies need to be reviewed, revised or enforced. W. Va. Code §18-29-11(1992). Each report contains summaries of all decisions issued during the immediately preceding month.

If you have any comments or suggestions about the monthly report, please send an e-mail to [wvgb@wv.gov](mailto:wvgb@wv.gov).

NOTICE: These synopses in no way constitute an official opinion or comment by the Grievance Board or its administrative law judges on the holdings in the cases. They are intended to serve as an information and research tool only.

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**HIGHER EDUCATION EMPLOYEES**

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<b><u>KEYWORDS:</u></b>	Failure to Pursue; Untimely; Moot; Doctrine of Laches; Time Frame
<b><u>CASE STYLE:</u></b>	<u>Frost v. Bluefield State College</u> DOCKET NO. 2012-0055-BSC (9/22/2014)
<b><u>PRIMARY ISSUES:</u></b>	Whether Grievant failed to pursue his grievance after appealing to Level Three.
<b><u>SUMMARY:</u></b>	Respondent failed to present preponderant evidence that Grievant failed to appeal the grievance to Level Three. However, Respondent established by preponderant evidence that Grievant committed laches by failing to exercise due diligence in the pursuit of his grievance during a period in excess of two years. Therefore, because this issue is determinative of this motion, it is not necessary to address Respondent's assertion that the grievance is substantively moot.

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**PROFESSIONAL PERSONNEL**

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<b><u>KEYWORDS:</u></b>	Selection; Qualifications; Experience; Job Duties; Interview; Training; Arbitrary and Capricious
<b><u>CASE STYLE:</u></b>	<u>Berry v. Boone County Board of Education</u> DOCKET NO. 2014-0450-BooED (9/29/2014)
<b><u>PRIMARY ISSUES:</u></b>	Whether Grievant proved by a preponderance of the evidence that Respondent's choice of the most qualified applicant for the position was arbitrary and capricious.
<b><u>SUMMARY:</u></b>	Grievant alleges that Respondent violated W. Va. Code § 18A-4-7a because she was the most qualified applicant for a non-teaching position, but was not selected to fill the job. Respondent demonstrated that the predominate duties for the position related to evaluating students and coordinating activities of staff and committees. Another applicant had more experience in these areas and performed better on the interview which became the determining factor in choosing the successful candidate. Grievant did not prove by a preponderance of the evidence that Respondent's choice of the successful candidate was arbitrary, capricious or in violation of the statute.

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<b><u>KEYWORDS:</u></b>	Selection; Arbitrary and Capricious; Posting; Training; Qualifications
<b><u>CASE STYLE:</u></b>	<u>Friend, Sr. v. Nicholas County Board of Education</u> DOCKET NO. 2014-0078-NicED (9/29/2014)
<b><u>PRIMARY ISSUES:</u></b>	Whether Grievant met his burden of proving that he should have been selected for the position of Director of Transportation/Student Services over the successful candidate.
<b><u>SUMMARY:</u></b>	<p>Respondent posted the Director of Transportation/Student Services position on June 27, 2013. This posting closed at 4:00 p.m. on July 3, 2013. Grievant was the only applicant. One of the qualifications for this position was having had professional evaluation training. The system for professional employee evaluations changed on July 1, 2013, during the posting period for the position. Grievant had completed the training on the previous evaluation system, but not the training on the new system. Further, no employees other than principals and administrators had received the training at the time of the posting. Respondent determined that Grievant did not meet the qualifications for the position because he had not completed the new evaluation training. Respondent reposted the position. Grievant and another applicant applied for the position under the second posting. Grievant was not selected for the position. Grievant asserts that he met the qualifications when he applied for the first posting and that he should have been selected as he was the only applicant. Further, Grievant asserts that Respondent should not have reposted the position, and that the position should have been posted as a service personnel position, not as a professional position. Respondent denies Grievant's claims, and argues that as there were no qualified applicants for the first posting, the position was properly reposted, and Respondent selected the most qualified candidate. Grievant failed to prove his claims by a preponderance of the evidence. Therefore, this grievance is DENIED.</p>

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<b><u>KEYWORDS:</u></b>	Extracurricular Duties; Fair Labor Standards Act; Bus Duty; Pay Overtime; Compensation
<b><u>CASE STYLE:</u></b>	<u>Lemasters v. Jackson County Board of Education</u> DOCKET NO. 2014-0508-JacED (9/30/2014)
<b><u>PRIMARY ISSUES:</u></b>	Whether Grievant established by that Respondent violated W. Va. Code § 18A-4-16 when she was required to perform extracurricular bus duties before and after her regularly scheduled working hours.
<b><u>SUMMARY:</u></b>	Grievant is employed by Respondent Jackson County Board of Education ("JCBOE") as a classroom teacher. Grievant established by a preponderance of the evidence that she and other teachers at Gilmore Elementary School were assigned on a rotating basis to perform bus duties during the 2013-2014 school year. These bus duties either involved supervising students after their buses arrived in the morning before classes began, or in the afternoon before boarding their buses after classes ended. Because Grievant further established that these bus duties commenced before the beginning of her regularly scheduled work day and ended after the conclusion of her regularly scheduled work day, and these duties do not involve instruction of students, this assignment involves extracurricular duties which may only be assigned by mutual agreement of the employee and the superintendent. Grievant did not agree to perform these duties, performing them only because she was directed to do so by her school principal. Accordingly, this grievance will be GRANTED.

**KEYWORDS:**

Selection; Coach; Qualifications; Experience; Interview; Abuse of Discretion; Arbitrary and Capricious

**CASE STYLE:**

Clevenger v. Wood County Board of Education

DOCKET NO. 2013-0325-WooED (9/2/2014)

**PRIMARY ISSUES:**

Whether Grievant proved that the Respondent's selection for the position of head wrestling coach was arbitrary and capricious or an abuse of discretion.

**SUMMARY:**

Grievant applied for the position of Head Wrestling Coach at Parkersburg South High School; however, he was not selected for the job. Grievant had been a wrestler, and had been both an assistant coach and head coach for wrestling teams in three schools in the county in the 1970s and 1980s. However, he had not coached since 1989. The successful applicant, a woman, had never been a wrestler herself, but had been involved with the sport for many years and had coached for a private pee wee wrestling organization. Grievant asserts that he was the most qualified candidate for the job, and that Respondent's decision to hire the successful applicant was arbitrary and capricious and an abuse of discretion. Respondent denies Grievant's claims. Grievant failed to prove his claims by a preponderance of the evidence. Therefore, this grievance is denied.

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**COUNTY BOARDS OF EDUCATION**  
**SERVICE PERSONNEL**

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**KEYWORDS:** Prior Work Experience Credit; Classification; Ultra Vires Act

**CASE STYLE:** Schooley, et al. v. Preston County Board of Education  
DOCKET NO. 2014-0518-CONS (9/3/2014)

**PRIMARY ISSUES:** Whether Grievants established a violation of W. Va. Code § 18A-4-5b by the Respondent

**SUMMARY:** Grievants argue that they should receive a salary supplement based upon prior work experience that was similar to the duties they perform for Respondent. All of the Grievants were denied prior work experience credit on the basis that their classification titles did not fall within the area of critical need. Grievants argue that they perform like assignments and duties to employees of Respondent that were granted prior work experience credit. The record established that the prior superintendent that granted the work experience credit did so without the appropriate authority. In addition, the record failed to establish that Respondent violated West Virginia Code § 18A-4-5b.

**KEYWORDS:** Insubordination; Willful Neglect of Duty; Unsatisfactory Performance; Evaluation; Correctable Conduct; Inappropriate Interaction with Students; Failure to Properly Discipline Students; Hearsay; Use of Nicknames; Employee Code of Conduct

**CASE STYLE:** Lancaster v. Ritchie County Board of Education  
DOCKET NO. 2014-0868-RitED (9/19/2014)

**PRIMARY ISSUES:** Whether Grievant's conduct amounted to insubordination or unsatisfactory performance.

**SUMMARY:** Grievant was terminated from his employment as a Bus Operator for insubordination and willful neglect of duty; more specifically, inappropriate discussions with students on his bus, calling students by inappropriate nicknames, using inappropriate language, and generally, acting like one of the kids, and for allowing students to stand and move while the bus was moving. Grievant denied that students were allowed to move or stand on the bus, except that students were allowed to stand when they were talking to him so he could hear them, and he denied that students were not disciplined for inappropriate behavior, and his most recent performance evaluation supports Grievant's claims. Grievant also acknowledged that one conversation with students about their parents' political activities and the church was inappropriate. Grievant acknowledged that he had referred to students by nicknames, but denied that such actions were inappropriate. Grievant argued he should have been advised of his inappropriate behavior and given the opportunity to improve. Respondent failed to demonstrate that Grievant's behavior was not correctable.



**KEYWORDS:** Seniority; Summer Assignment; Same Program; Same Assignment; Location Change

**CASE STYLE:** Radabaugh v. Monongalia County Board of Education

DOCKET NO. 2013-1996-MonED (9/22/2014)

**PRIMARY ISSUES:** Whether a change in the location of the summer program made it a new summer program and whether the cook position was the same assignment.

**SUMMARY:** Grievant is employed by Respondent as a Cook III. She argued she should have been placed in a half-time summer Cook III position in the summer of 2013, because it was a newly-created position and she was the most senior applicant. Grievant had no summer seniority. The summer position at issue in the summer of 2013 was the same summer position held by another employee in the summer of 2012, as the summer program for which the Cook III was needed was exactly the same. The fact that the location of this summer program changed from one summer to the next does not make this summer position a newly-created position under the facts of this case. Respondent correctly returned the employee who held the position in the summer of 2012 to the position in the summer of 2013.

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**STATE EMPLOYEES**

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<b><u>KEYWORDS:</u></b>	Probationary Employee; Unsatisfactory Performance; Favoritism; Hostile Work Environment
<b><u>CASE STYLE:</u></b>	<u>Simms v. Department of Health and Human Resources</u> DOCKET NO. 2014-1007-DHHR (9/19/2014)
<b><u>PRIMARY ISSUES:</u></b>	Whether Respondent had good cause to terminate Grievant's probationary employment.
<b><u>SUMMARY:</u></b>	Grievant was dismissed from her probationary employment as a Child Protective Services Worker Trainee for unsatisfactory performance. Grievant's deficiencies were not fabricated or exaggerated and her performance was not satisfactory. Grievant did not prove that she was prevented from completing her probationary employment due to favoritism, a hostile work environment, or Respondent's failure to accommodate her alleged disability. Accordingly, the grievance is denied.

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<b><u>KEYWORDS:</u></b>	Nonselection; Qualifications; Selection Process; Arbitrary and Capricious
<b><u>CASE STYLE:</u></b>	<u>Wanless v. Division of Highways</u> DOCKET NO. 2014-0067-DOT (9/24/2014)
<b><u>PRIMARY ISSUES:</u></b>	Whether Grievant proved that the selection process was flawed.
<b><u>SUMMARY:</u></b>	Grievant was not selected for a management position despite her large number of certifications and years of experience. Respondent selected Intervenor, another long-term employee with significant training, based on his superior communications and management skills. Grievant did not prove that the selection process was flawed. Respondent's selection of Intervenor was supported by the evidence and Grievant failed to prove that the decision was arbitrary and capricious. Accordingly, the grievance is denied.

**KEYWORDS:**

Disciplinary Action; Suspension; Termination; Credibility; Selling of State Property; Surplus Equipment; Forbidden Conduct; Policies; Retaliation; Mitigation; Arbitrary and Capricious

**CASE STYLE:**

Morgan, et al. v. Division of Highways

DOCKET NO. 2014-0549-CONS (9/25/2014)

**PRIMARY ISSUES:**

Whether Respondent's decision to suspend and/or terminate Grievants was excessive or an abuse of discretion.

**SUMMARY:**

Grievants were disciplined for actions or inaction relating to events pertaining to the conversion of salvage and/or used state equipment. Grievants protest their individual disciplinary action. Further, Grievants maintain the discipline was disproportionate to the facts, not administered equitably and/or was without good cause. Respondent maintains that it acted within the provisions of relevant statutes, regulations and/or policies in disciplining the instant employees. Respondent established that it was appropriate to suspend Grievants pending the outcome of an investigation of alleged improper conduct. Respondent demonstrated that a supervising employee failed in his responsibilities to address employees under his supervision who he had reasonable knowledge were engaged in the conversion of state surplus. Grievants highlight that Respondent has not historically sanctioned employee, as severely, for the same or similar conduct to that which is being pursued herein. Mitigating factors are present in the circumstances of this matter. The suspension of each Grievant pending the investigation of allegations is upheld and not overturned. Grievances pertaining to unpaid suspension are denied. Grievant Burns protest of his termination is granted. Accordingly, this consolidated grievance is GRANTED-IN-PART.

**KEYWORDS:** Resident Abuse; Retaliation; Incident; Misconduct; Reprisal; Improper Discipline

**CASE STYLE:** Hamilton v. Department of Health and Human Resources/Welch Community Hospital  
DOCKET NO. 2014-1767-CONS (9/30/2014)

**PRIMARY ISSUES:** Whether Respondent proved it had good cause to dismiss Grievant from employment.

**SUMMARY:** Grievant, a Certified Nursing Assistant, was suspended and then dismissed from employment for resident abuse. Grievant had previously successfully grieved her dismissal from employment for another allegation of resident abuse, and had a pending related grievance at the time of her instant dismissal from employment. Grievant established a prima facie case of retaliation. Respondent failed to prove that Grievant's actions constituted abuse or otherwise violated any other law, policy, or procedure. Respondent did not have good cause to dismiss Grievant from employment. Respondent cannot show legitimate, non-retaliatory reasons for Grievant's dismissal from employment and, therefore, Grievant's dismissal from employment was also retaliatory. Accordingly, the grievance is granted.

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**KEYWORDS:** Probationary Employee; Unsatisfactory Performance

**CASE STYLE:** Cunningham v. Division of Highways  
DOCKET NO. 2013-1726-DOT (9/19/2014)

**PRIMARY ISSUES:** Whether Grievant proved that his work for Respondent was satisfactory; it was within his employer's discretion to terminate his probationary employment.

**SUMMARY:** Grievant's probationary employment was terminated, due to the Division of Highway's determination that his performance was unsatisfactory, specifically with regard to properly performing his duties and taking direction from his supervisors. When a probationary employee is terminated due to work performance, it is his burden to prove his services were satisfactory. In this case, Grievant failed to meet this burden, and the evidence supported the conclusion that Grievant repeatedly failed to follow proper procedures for performing his assigned duties and resisted direction from his supervisors. Therefore, this grievance is denied.

**KEYWORDS:** Pay Increase; Equal Pay for Equal Work; Classification; Pay Plan Implementation Policy; Job Duties

**CASE STYLE:** Lott v. Division of Highways and Division of Personnel  
DOCKET NO. 2011-1456-DOT (9/9/2014)

**PRIMARY ISSUES:** Whether Grievant is entitled to a pay increase on the basis of equal pay for equal work.

**SUMMARY:** Grievant seeks to receive a pay raise because she had performed additional duties as a Storekeeper 3 since September 2010. Under the relevant policy, such increases are discretionary, but not mandatory. Grievant also argues that she should receive a pay raise on the basis of internal equity provision of the relevant policy. The record did not demonstrate a violation of any statute, rule, policy or procedure, or otherwise demonstrate that Grievant was entitled to an increase in her salary.

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**KEYWORDS:** Temporary Employee; Form OHRM-15; Non-Selection

**CASE STYLE:** McGinnis v. Department of Health and Human Resources/Lakin Hospital  
DOCKET NO. 2014-1661-DHHR (9/3/2014)

**PRIMARY ISSUES:** Whether Respondent has proven by a preponderance of the evidence that Grievant lacks standing to file a grievance as a temporary employee.

**SUMMARY:** Grievant, a temporary employee, grieved his non-selection for a permanent position. Grievant does not meet the definition of “employee” under the grievance statute and, therefore, lacks standing to file a grievance. Accordingly, the grievance is dismissed.

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<b><u>KEYWORDS:</u></b>	Additional Duties; Position Description Form; Job Duties; Responsibilities; Reclassification; Arbitrary and Capricious
<b><u>CASE STYLE:</u></b>	<u>Bradshaw v. Fire Commission and Division of Personnel</u> DOCKET NO. 2013-2152-MAPS (9/5/2014)
<b><u>PRIMARY ISSUES:</u></b>	Whether Grievant proved by preponderance of the evidence that her position should be reallocated from the Secretary 1 classification to the ASA 1 to classification.
<b><u>SUMMARY:</u></b>	<p>Grievant, a Secretary 1 for Respondent Fire Commission, seeks to have her position reallocated from the classification of Secretary I, asserting that "she has been working out of her classification." The Division of Personnel is charged with making classifications. Grievant did not identify the classification sought in her grievance statement. During the course of the grievance proceedings, the Division of Personnel conducted a desk audit and further review and determined that the position should be reallocated to Administrative Services Assistant 1, finding that Grievant served in a "specialized capacity approving or denying applications/licenses." Grievant appealed that determination, specifically asserting that her position should be reallocated to the classification of an Administrative Services Manager 1. DOP affirmed its decision that the proper classification for Grievant's position was Administrative Services Assistant 1. At the level three hearing, the Division of Personnel changed its determination, stating that Grievant's position should be classified as an Office Assistant 3, which would operate to demote the position. Grievant proved that the Division of Personnel's classification of her position as an Office Assistant 3 was clearly wrong. Grievant did not prove that the position should be reallocated to the Administrative Services Manager 1 classification. However, Grievant established that her position should be reallocated to the Administrative Services Assistant 1 classification. This grievance is GRANTED.</p>

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**KEYWORDS:** Dismissal; Moot; Controversy, Advisory Opinion

**CASE STYLE:** DeMoss, et al. v. Division of Highways  
DOCKET NO. 2014-1523-CONS (9/16/2014)

**PRIMARY ISSUES:** Whether the cancelation of the discipline recommended for Grievants has rendered this grievance moot.

**SUMMARY:** Grievants filed grievances contesting the disciplinary actions that were recommended against them by Respondent. Subsequent to the issuance of the level one decision, but prior to the level two mediation in this matter, Respondent canceled the recommended disciplinary actions. Therefore, ultimately, Grievants were not disciplined as they had grieved. Respondent's cancelation of the recommended disciplinary action has rendered this grievance moot. Accordingly, this grievance is DISMISSED.